IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/03/2003

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION No.11029 of 1997
and 11423 & 23126/2001.

S.Srinivasan ..Petitioner

-Vs-

1. The Presiding Officer
Labour Court, Cuddalore

2. The Chairman,
TNEB, Madras-2

3. The Chief Engineer/Personnnel
TNEB, Anna Salai, Madras-2 ..Respondents

For petitioner:: Mr.A.Asaithambi

For respondents: Mr.V.Radhakrishnan

Petition filed under Article 226 of The Constitution of India praying for the issue of a writ of certiorari as stated therein.

:O R D E R

The petitioner prays for the issue of a writ of certiorari to call for and quash the order dated 26th May 1996 made made in I.D.No.40 of 1995 on the file of the first respondent-Labour Court.

2. The petitioner was an Junior Engineer in the Tamil Nadu Electricity Board. According to the petitioner he fell sick very often during 1986-1987. On 12.7.1986 and 13.7.1986 without permission he proceeded to his native place. Thereafter, after reaching his place he fell sick and he applied for casual leave from 14.7.1986 to 19.7.1986 with permission to avail Sunday 20.7.1986 by sending three telegrams. The petitioner could not rejoin duty and sent 11 leave applications periodically requesting Medical Leave from 21.7.1986. The leave applications were returned except his 11th leave letter dated 8.12.1986.

3. On 6.11.1986, three charges were framed against the petitioner by the third respondent. The first charge being that the petitioner

unauthorisedly absented from duty without prior permission and leave application from 20.7.1986. The second char being that the petitioner had not handed over the chest key and Section Office properly and the third charge being that the petitioner had not handed over the Board's quarters. The three charges were framed purporting to be a misconduct under the Tamil Nadu Electricity Board Discipline Appeal Regulations applicable to officers. However, on 6.12.1986 an amended memo was issued framing charges 1 and 2 u nder Standing Orders applicable to non clerical employees of the Board.

4. The petitioner denied the charges and resubmitted questionnaire form with option for hearing in person instead of conventional enquiry. No date was fixed for inspection of records and the petitioner was called upon to file a defence statement after enquiry. The enquiry was fixed and the the first notice dated 31.3.1987 was served by the Divisional Engineer(Distribution) Villupuram, which was not received by the petitioner. The second notice dated 21.4.1987 scheduling the enquiry to be conducted on 7.5.1987 was received by the petitioner on 2.5.1987. AS the petitioner was ill and due to stringent financial position created by the third respondent, the petitioner could not participate in the enquiry. The petitioner requested for postponement of the enquiry. The third notice dated 7.5.1987 fixing the enquiry on 19.5.1987 was served on 18.5.1987. As there was no sufficient time, the petitioner sent a telegram seeking for adjournment of enquiry.

5. The enquiry officer proceeded with the enquiry ex parte and the petitioner did not have the opportunity to file his written statement. A show cause memo dated 7.12.1987 was sent to the petitioner. Copy of the enquiry proceedings was not furnished. However, the petitioner filed a formal reply and after communication of the enquiry proceedings, a supplementary reply was submitted on 14.6.1988. Without considering those replies, explanation, the penalty of dismissal was imposed by the proceedings dated 29.7.1988.

6. The appeal preferred against dismissal ended in rejection on 23.3.1989. Further, the petitioner moved the Labour Officer for conciliation which conciliation failed. Hence the petitioner raised an Industrial Dispute in I.D.No: 417 of 1992 before the first respondent-Labour Court. The Labour court by award dated 26.7.1996 while holding that the order of dismissal is valid, rejected the claim. Being aggrieved, the present writ petition has been filed. The above writ petition came to be dismissed for non prosecution. However, it was restored to file after notice to respondent.

7. The third respondent filed a detailed counter elaborating the circumstances under which the proceedings were initiated, the details of enquiry conducted by the enquiry officer, the decision taken by the disciplinary authority as well as the appellate authority. The petitioner having failed to appear for the enquiry inspite of several adjournments which resulted in the enquiry being proceeded ex parte and therefore the petitioner cannot blame the enquiry officer or the disciplinary authority for his lapse. The petitioner deserves the maximum punishment in view of the gravity of charges. The disciplinary authority imposed the punishment of dismissal after taking into consideration of the past record of service. The petitioner is not entitled to any relief. The contention advanced by the petitioner are

devoid of merits and untenable.

8. Heard Mr.S.Suresh Kumar, learned counsel appearing for the writ petitioner and Mr.V.Radhakrishnan, learned counsel appearing for the second respondent.

9. The points that arise for consideration are:-
(A) Whether the conclusion that the petitioner is guilty of charge No.1 could be sustained?

(B) Whether the charges 2 and 3 even assuming the imputations based upon which said charges are framed to be correct, do they constitute a misconduct under para 30 of the Standing Orders?

(C) Whether the imposition of penalty of dismissal from service is highly disproportionate, excessive shocking and liable to be interfered?

10. Mr. S.Suresh Kumar, learned counsel appearing for the petitioner took the court through the award of the first respondent Labour Court, the charges framed, the enquiry report advanced various contentions. Though the petitioner has been found guilty of charges 2 and 3, he is not liable to be proceeded for alleged misconduct under the Standing Orders. The third charge being omission to hand over the quarters occupied by him before his absenting from duty. It is to be contended that such a omission to hand over the quarters is not a misconduct falling under clause 30(x) of the Standing Orders.

11. A perusal of the said clause would show that the third charge assuming the imputations are correct, will not fall under Clause (x) of the Standing Order 30. According to clause (x) of Standing Order 30, the misconduct being habitual negligence or neglect of work. So the failure to hand over the quarters will not constitute a misconduct as enumerated in para 30 of the Standing Orders. Yet, the petitioner has been found guilty of this charge as well.

12. The approach of the disciplinary authority, appellate authority as well as the first respondent-Labour Court in this respect suffer with error apparent on the face of the record, it is a misconception of the entire disciplinary action and in particular the said respondents have omitted to examine whether the imputations themselves would constitute a misconduct at all. It may be that the petitioner has left the quarters as it is without handing over for which he may be liable for rent or damages. But such a omission to hand over will not fall under one or more enumerated acts of omission constituting misconduct. In fact the quarters were taken over possession on 20.5.1987 by breaking open the lock. Therefore, the conclusion arrived at in respect of charge No.3 cannot be sustained.

13. Taking up the second charge the imputations being that the petitioner has failed to hand over the cash chest key and section office properly prior to his absenting from duty. In terms of the amendment issued to the charge memo, according to the disciplinary authority this falls under

the same Clause (x) of Standing Order para 30 as constituting a misconduct. The imputations in this respect even if accepting to be true, it will not fall under Clause (x) of Standing Order Para 30 which standing order enumerates acts and omission constituting misconduct. It is not the case of the respondents that there has been any misappropriation of funds or default or that the petitioner has taken away the assets of the Board when the petitioner proceeded on leave and extending his leave by sending applications after applications. He has not handed over the chest key.

14. It is seen from the records another Assistant Engineer, Udumalpet has taken over charge from the petitioner on 30.1.1996 just before the petitioner proceeding on leave. This is clear from the typed set of papers filed by the petitioner. Presumably, under certain orders of the superior officer the petitioner has handed over the charges. Therefore it is not correct to state that the petitioner has not handed over the charge. Even assuming that the petitioner has failed to hand over charge properly, such an omission as already pointed out will not fall under Para 30, Clause (x) of the Standing Orders.

15. In respect of the second charge also it is clear that the enquriy officer, the disciplinary authority, the appellate authority and the first respondent-Labour court have proceeded on a total misconception of the imputations and acted with material irregularity and misdirected themselves in holding that the petitioner is guilty of the misconduct falling under Para 30, Clause (x) of the Standing Orders. The conclusion arrived at and finding by the respondents in respect of charge No.2 cannot be sustained.

16. What remains to be considered is Charge NO.1. The first charge being unauthorisedly absented himself from duty without permission and leave application from 20.7.1986 onwards which is a misconduct in terms of Para 30, Clauses (vii) and (xxvi). Para 30, clause (vii) reads thus:-

"30(vii): Habitual late attendance or habitual absence without leave or absence without leave for more than 10 consecutive days without sufficient cause."

17. It is not a case of habitual late attendance or habitual absence, but the petitioner proceeded on leave after submitting necessary leave application and extended the same by submitting few more application. The petitioner claims that all these applications were kept pending and leave applied has not been rejected. According to the petitioner he was having sufficient cause while in leave, but the respondent has not examined as to whether the cause disclosed by him in the leave letter is a sufficient cause to avail leave. Clause (xxvi) reads thus:-
"Continuous absence without permission and without satisfactory cause for more than 10 days."

18. In this case the petitioner at the first instance applied for leave to leave the headquarters. Thereafter he has submitted his leave application. But none of those applications have been considered or rejected. The petitioner kept on forwarding the leave applications. Yet the respondents

have neither rejected those leave applications, nor recalled the petitioner to report for duty forthwith as the cause assigned for leave was not accepted. Pointing out this, the learned counsel appearing for the petitioner contended that even the first charge has to necessarily fail.

19. But concedingly, the petitioner had absented himself for months together by merely forwarding application after application. The reason set out in the leave application cannot even be suggested as a valid reason or cause for availing leave for such a long period. It is an unauthorised absence for a continuous period. Therefore, the petitioner cannot contend that he is no t guilty of first charge. There are materials to show that the petitioner has absented himself and as a matter of right sending application after application seeking for leave. Leave Rules do not provide for such a course being adopted by the petitioner, an Engineer who is in charge of a Section. The first charge as has been found by all the respondents deserves to be sustained. The Point (A) is answered against the writ petitioner and Point B is answered in favour of the petitioner.

20. Taking up the last point, it is contended that the penalty imposed is highly disproportionate, arbitrary and liable to be quashed by this court. The first respondent labour court has declined to interfere with the penalty imposed as the petitioner is guilty of all the three charges which is a total misconception and cannot be sustained. The first respondent has failed to exercise the jurisdiction vested under Section 11-A of The Industrial Disputes Act. If at all, the petitioner could be found guilty of the first charge only and for which a dismissal from service, it is contended is shockingly disproportionate and excessive. The appellate authority also has not considered this aspect, nor the Labour Court has examined the quantum of punishment by eschewing the charges 2 and 3.

21. While imposing the punishment, what has been stated is taking into consideration of the past record of service, the punishment of dismissal has been imposed. But there is nothing to show that the petitioner has been appraised of his past conduct or record and there being no reference to the past record of service in the impugned procedings this finding cannot be sustained. This is not a relevant consideration in the absence of the petitioner being disclosed of the same. Non disclosure of the past records being taken into consideration for imposing the penalty which is being indicated in the counter vitiates the action. It may not be necessary to refer to the past records in the show cause notice. But at least in the second stage of penalty proceedings it should have been disclosed.

22. The Supreme Court in 2002 (7) SCC 168, laid down thus:-

"10. The High Court seems to have overlooked the settled position that in departmental proceedings, insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the disciplinary or Appellate Authority is either impermissible or such that it shocks the conscience of the High Court, it should not normally interfere with the same or substitute its own opinion and either impose some other punishment or penalty or direct the authority to impose a particular nature or category of

punishment of its choice..."

23. In U.P. State Transport Corporation Vs. A.K.Parul, reported in 1998 (9) SCC 416 the Supreme Court held thus:-

"3....This Court consistently has taken the view that while exercising judicial review the courts shall not normally interfere with the punishment imposed by the authorities and this will be more so when the Court finds the charges were proved. The interference with the punishment on the facts of this case cannot be sustained. In State Bank of India v. Samarendra Kishore Endow1 this Court held that imposition of proper punishment is within the discretion and judgment of the Disciplinary Authority. It may be open to the appellate authority to interfere with it, but not to the High Court or to the Administrative Tribunal for the reasons that the jurisdiction of the Tribunal is similar to the powers of the High Court under Article 226. As noticed earlier, the High Court, having found the charges proved, is not justified in interfering with the punishment imposed by the Disciplinary Authority, particularly when in this case, the respondent was once removed from service on the charge of corruption and again reinstated. On the facts, the interference by the High Court was not at all justified...."

24. In State of Karnataka Vs. H.Nagaraj, reported in 1998 (9) SCC 67 1 it has been held that the principle of proportionality can be invoked only in a case where the punishment was totally irrational in the sense that it was in outrageous defiance of logic or moral standards.

25. In Sanchalakshri v. Vijayakumar Raghuvirprasad Mehta,, reported in 1998 (8) SCC 245, after considering the earlier pronouncements, in B.C. Chaturvedi v. Union of India, the Apex Court held thus:-

"The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."
Neither the Tribunal nor the High Court in this case has held that the punishment imposed upon Respondent 1 was shockingly disproportionate. "

26. In the light of the above discussions when charges 2 and 3 are held to be not misconduct at all, as the charges 2 and 3 and imputations based upon which charges were framed will not constitute misconduct. Therefore if at all the first charge alone remains to be taken into consideration for imposition of punishment. The question whether the imposition of punishment of dismissal on the first charge, which alone if at all survives is proportionate or irrational or highly disproportionate has to be considered.

27. It is true the petitioner proceeded on leave after applying for leave which would mean that he was permitted to proceed on leave and in fact

charge also handed over by the petitioner to begin with. Thereafter for some extraordinary reasons which the petitioner sought to suggest and which the respondents are not prepared to even consider, the petitioner sent on submitting 11 leave applications continuously. All the 11 leave applications are kept pending and they have not been disposed of. At no point of time, the leave applications have been rejected and the petitioner had been called upon to forthwith attend duty.

28. It is true that the petitioner is not entitled to proceed on leave as a matter of routine or as a matter of right. Even if a particular category of leave is declined, the petitioner has the right to avail other category of leave which he is eligble and he could avail the same if the circumstances are compelling or he may even avail leave on loss of pay or on any other ground. But there has been no consideration of this aspect of the matter.

29. At any rate when two out of three charges do not survive the punishment of dismissal cannot be held as shockingly disproportionate, irrational, arbitrary and uncalled for and further more when the respondents themselves have contributed for such a position in which the petitioner has been placed. Had the respondents have declined the leave applied for, the respondents would be justified in treating the conduct of the petitioner as unauthorised absence or habitual absence. All the leave letters were being received and kept pending and not being disposed of even till date. Therefore

it is too harsh and shocking to impose the maximum penalty of dismissal. It is equally shocking to impose the penalty of dismissal from service, which is highly disproportionate by all standards.

30. It is also pointed out that the petitioner's past service has been taken into consideration. But there was no disclosure of the same. Even in the counter also it has been set out that past record of service has been taken. But it has not been disclosed even at the stage of imposing penalty. This omission which has a bearing and which vitiates the proceedings has to be taken into consideration. However at the same time, this court will not be justified in holding that the petitioner is not guilty of the first charge in its entirety. The petitioner is guilty of absenting himself and when the leave has not been sanctioned he should have chosen to report for duty without delay.

31. In this case the petitioner has already crossed the age of superannuation. While holding that the punishment of dismissal is shockingly disproportionate, irrational and arbitray, this court while following the pronouncement in A.V.Mohal Vs. Senior Superintendent of Post Office, reported in 1991 Suppl. (2) SCC 503 will be justified in imposing the punishment of compulsory retirement and directing payment of full pension from the date of the award of the labour court and directing the respondents to pay 25% of pension for the period commencing from 29.7.1988 to the date of award of the Labour Court. Such a view is taken taking into consideration of the passage of time and the petitioner is without any income at this stage after rendering nearly two decades of service.

32. In the circumstances, the writ petition is allowed. The punishment of dismissal from service as awarded by the original authority, confirmed by the appellate authority and affirmed by the labour court is modified to that of compulsory retirement with a direction to pay full pension from the date of award of the labour court and 25 % of the arrears of pension from 29.7.1988 the date of dismissal till the date of the award passed by Labour Court. The respondents are directed to settle the terminal benefits as directed above within three months from today and all arrears of pension and other benefits if any which the petitioner is eligible.

33. Consequently, connected WMP is closed. No costs.

Internet:yes
Index:yes
gkv
28-03-2003

Copy to:-

1. The Presiding Officer
Labour Court, Cuddalore

2. The Chairman,
TNEB, Madras-2

3. The Chief Engineer/Personnnel
TNEB, Anna Salai, Madras-2